

NONPRECEDENTIAL

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA,)

Plaintiff)

v.)

CRAIG M. HENDRICKS,)

RUSSELL ROBINSON, aka "Don,")

ELROY DOWE,)

DANIEL FLEMING,)

RANNEY LARONDE, aka "Ronnie,")

ANDY ANTOINE,)

RUDOLPH CLARKE,)

RAFAEL CINTRON,)

JACQUELYN CARR,)

Defendants)

CRIM. NO. 2004-05 F/R

MEMORANDUM OPINION

Finch, Chief Judge

This matter comes before the Court on the motion of Defendant Rudolph Clarke to suppress evidence derived from illegal electronic surveillance. Defendants Andy Antoine, Rafael Cintron, Elroy Dowe, Craig M. Hendricks, Ranney Laronde, and Russell Robinson join Defendant Clarke in this motion. The Government has filed responses to this motion as to Defendants Clarke, Dowe, and Robinson. The Court held a hearing on the matter on March 30, 2004. For the reasons expressed herein, Defendant's motion will be denied.

I. Background

In January 2003, the Court issued a wiretap intercept on cellular telephones subscribed to Craig Hendricks and Jessica Magrass, and a vehicle registered to Craig Hendricks. In February 2003, the Court extended the initial wiretap authorization. Although Defendant Clarke was not targeted in either Order, his communications were intercepted pursuant to said wiretap. He has been indicted in this matter based on various pieces of evidence, including evidence produced from said wiretap. (Defendants' Motion at 2.)

Defendant has brought forth this motion arguing that the Fourth Amendment of the United States Constitution and 18 U.S.C. § 2510 et. seq require the suppression of all oral communications seized pursuant to the January 2003 and February 2003 applications for wiretap intercept. For a judge to authorize the interception of wire communications, 18 U.S.C. § 2518(3) requires that the facts submitted demonstrate probable cause that an individual is committing, has committed, or is about to commit a violation of 18 U.S.C. § 2516; probable cause that interception will yield specific communications related to that offense; that alternative procedures have either failed or reasonably appear likely to fail or are too dangerous; and probable cause that the wire communications intercepted are leased to, listed under the name of or, or commonly used by the person.

II. Analysis

A. Delegation of Authority to Seek Interception Orders in Federal Courts

Defendant admits that while it would have been appropriate, under 18 U.S.C. § 2516(1),

for Attorney General Ashcroft to delegate the authority to seek interception orders in Federal Courts to a specific Assistant Attorney General, it was improper for the Attorney General to delegate said authority to every Deputy Assistant Attorney General, Criminal Division.

(Defendants' Motion at 5 - 14.) In the instant case, the U.S. Department of Justice memorandum for each authorization of interception order application at issue was signed by an individual holding the title of Deputy Assistant Attorney General, Criminal Division. (Defendants' Motion at Exhibit A.)

Defendant's argument is without merit. The Attorney General's Order Number 2407-2001 specifically designated any Deputy Assistant Attorney General of the Criminal Division to exercise authority pursuant to 18 U.S.C. § 2516(1), which provides in relevant part:

The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications....

18 U.S.C. § 2516(1).

Accordingly, it is proper for an individual, acting in the capacity of a Deputy Assistant Attorney General, Criminal Division, to review and grant a wiretap authorization.

B. Probable Cause Requirement

In U.S. v. Vento, 533 F.2d 838, 847 (3d Cir. 1976), the Third Circuit declared that for a wiretap application in which informants have provided the main basis for probable cause, the appropriate test for probable cause is governed by the analysis regarding probable cause for search warrants found in Aguilar v. Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 1513, 12 L.Ed.2d

723, 728 (1964) and Spinelli v. United States, 393 U.S. 410, 415-416, 89 S.Ct. 584, 588, 21 L.Ed.2d 637, 643 (1969). Id. at 847 (citing United States v. Armocida, 515 F.2d 29, 36 (3d Cir. 1975); United States v. Falcone, 505 F.2d 478, 481 (3d Cir. 1974); United States v. McNally, 473 F.2d 934 (3d Cir. 1973)). However, the Aguilar-Spinelli test has since been replaced by a “totality of the circumstances” approach under Illinois v. Gates, 462 U.S. 233, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983). Under the Gates approach, an informant’s “reliability” and “basis of knowledge” are still important considerations in determining whether probable cause is sufficient, but other circumstances must be taken into account as well. Id. at 233.

Regarding the wiretap intercept issued in January 2003, Defendant Clarke argues that probable cause was inadequate because only CS 4 alleged that Hendricks used the telephone for illegal activity and Hendricks had directly told CS4 that he refused to conduct business over the phone. (Defendants’ Motion at 15 - 18.) The Government contends that the application and affidavit supporting the wiretap request establishes the requisite probable cause that Hendricks and his associates would use the telephone for illegal activity. (Government’s Opposition at 22.) Applying the totality of the circumstances approach on this issue in deciding Defendant Dowe’s Motion to Suppress, the Court determined that there was probable cause to support authorization of a wiretap intercept. Analyzing the application and affidavit, the Court found a sufficient set of facts upon which probable cause could be found to support the issuance of a wiretap. Similarly, the February 2003 wiretap authorization was merely for an extension of the January 2003 wiretap.

C. Necessity Requirement

Regarding the necessity requirement for obtaining authorization for a wiretap, the Third Circuit in U.S. v. Vento, 533 F.2d 838 (3d. Cir. 1976), held that “[i]t is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation. The government must, however, fully explain to the authorizing judge the basis for such a conclusion.” Id. at 849 (citing United States v. Curreri, 388 F.Supp. 607, 620-21 (D.Md.1974)). The Third Circuit emphasized the disjunctive language of 18 U.S.C. § 2516(3)(c) and noted that the government need not prove that alternative methods have failed.

In the instant case, Defendant argues the Government had several confidential informants and successful physical surveillance, so that it was not necessary for the Government to also use wiretap intercepts. (Defendants Motion at 18 - 33.) The Government argues that the application and affidavit for the wiretap requests support its position that the necessity requirement was fulfilled. The Court has already examined this issue in deciding Defendant Dowe’s Motion to Suppress and concluded that the Government had indeed fulfilled the necessity requirement. The Third Circuit in Vento noted that “[u]ndercover agents are not readily insinuated into a conspiracy, and may be exposed to unusual danger.” U.S. v. Vento, 533 F.2d at 850. The Third Circuit elaborated that the full extent of a criminal conspiracy may not be discoverable through the use of undercover agents. In the instant case, the Government was investigating a complex criminal conspiracy. Furthermore, according to Special Agent Tokarz’s affidavit accompanying the wiretap application, at that time the Government only had one informant who was in contact

with Craig Hendricks and this informant was not privy to information central to the conspiracy. (Affidavit of Special Agent Joseph A. Tokarz, 39).

Therefore, the Government's limited success with confidential informants and physical surveillance did not preclude the Government from satisfying the necessity requirement for a wiretap intercept.

D. Failure to Comply with Court Orders

Defendant asserts that the Government did not minimize the phone intercepts and thereby violated both statutory mandates and judicial orders. (Defendants' Motion at 34 - 37.) The Government responds that considerable efforts were made to minimize interceptions. (Government's Opposition at 22). In determining whether minimization was sufficient, the Court's duty "is objectively to assess the agent's or officer's actions in light of the facts and circumstances confronting him at the time without regard to his underlying intent or motive." Scott v. U.S., 436 U.S. 128, 129, 98 S.Ct. 1717 (1978).

Defendant notes that monitoring occurred on a 24-hours basis, that only 127 out of 725 intercepted calls were pertinent, and that only 49 of the 598 non-pertinent conversations were minimized. (Defendants' Motion at 34.) The Government contests the accusation that monitoring was occurring around the clock. Specifically, the Government points out that the Government's reports to the Court indicate that monitoring usually took place between 6:00 a.m. and 10:00 p.m. (Government's Opposition at 25.) The Government asserts that most of the nonpertinent calls intercepted were very short and therefore did not need to be minimized (Government's Opposition at 24.) The Government correctly cites U.S. v. Capra, 501 F.2d 267

(2d. Cir. 1974). In Capra, the Court rejected the defendants' minimization claim, finding that the agents had tried to limit non-pertinent calls and that even though a large percentage of the intercepted calls turned out not to be pertinent, most of these non-pertinent calls were less than two minutes in length. Id. at 275.

Defendants argue that the interception of at least two attorney-client conversations show the Government's lack of minimization. (Defendants' Motion at 35.) The Government responds that these attorney-client conversations do not contain privileged material, but nonetheless concedes that it will not introduce those particular conversations at trial. (Government's Opposition at 24.)

Defendant also contends that the agents violated the Instructions to Supervising and Monitoring Agents by failing to spot check and neglecting to complete log maintenance. (Defendants Motion at 35 - 36.) The Government contends that Judge Moore took the appropriate role of supervising the wiretap and that every ten days, the Government had submitted reports regarding the wiretap and minimization efforts to Judge Moore. (Government's Opposition at 24.)

III. Conclusion

The Court finds that the wiretap intercepts were properly supported in terms of authority, probable cause, and necessity. Furthermore, the Court concludes that the Government fulfilled its duties with regard to minimization. Therefore, Defendant Clarke's Motion to Suppress Evidence Derived from illegal Electronic Surveillance will be denied. An appropriate Order is

attached.

ENTER:

Dated: April 23, 2004

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:

Wilfredo F. Morales
Clerk of the Court

By:

Deputy Clerk

cc: Hon. George W. Cannon
Patricia M. Sulzbach, Esq.
Eric Chancellor, Esq.
Andrew Capdeville, Esq.
Stephen Brusch, Esq.
Leonard B. Francis, Esq.
Anna Paiewonsky, Esq.
Kevin Weatherbee, Esq.
Clive Rivers, Esq.
Treston E. Moore, Esq.
Jomo Meade, Esq.

NOT FOR PUBLICATION

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JACQUELYN CARR,)	
)	
Defendants)	
_____)	

ORDER

THIS MATTER is before the Court on Defendant Rudolph Clarke's Motion to Suppress Evidence Derived from Illegal Electronic Surveillance, docket item # 174. In accordance with the attached Memorandum Opinion, it is hereby

ORDERED that Defendant's motion is **DENIED**.

ENTER:

Dated: April 23, 2004

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:

Wilfredo F. Morales
Clerk of the Court

By:

Deputy Clerk

cc: Hon. George W. Cannon
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